Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term 1997

GARY VICTOR DUBIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioner and Member,
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QUESTIONS PRESENTED

Is it a violation of the fair trial guarantees of the Fifth and Sixth Amendments, Sections 144 and 455 of Title 28, Judicial Canons 3(A)(4) and 3(C)(1)(a) & (d)(iii) & (iv), and such an unacceptable departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power, for a court of appeals' panel to apply an abuse of discretion standard of review and approve with sweeping due deference and without *de novo* review, in the context of a new trial motion:

1. a district judge's conviction of a *pro se* defendant in a criminal tax prosecution based upon secret, *ex parte*, outside-of-court prosecutorial hearsay concealed from that defendant until sentencing, contrary to this Court's decision in *Davis v. Alaska*, 415 U.S. 308 (1974);

2. a district judge's conviction of a *pro se* defendant in a criminal tax prosecution while denying that defendant access to and use of his defense files at trial, contrary to this Court's decision in *Cheek v. United States*, 498 U.S. 192 (1991);

3. a district judge's conviction of a *pro se* defendant in a criminal tax prosecution based upon false findings of fact after sentencing, seeking to conceal that denial of files to defeat any appeal, contrary to this Court's decision in *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575 (1945); and

4. a district judge's refusal to disqualify himself from deciding, and denying, that *pro se* defendant's new trial motion based upon the sufficiency of newly-discovered proof substantiating that his earlier findings claiming that defendant supposedly had his files from the start of trial were false, contrary to this Court's decision in *Liteky v. United States*, 510 U.S. 540 (1994)?

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I. JURISDICTIONAL STATEMENT

The district court entered its findings of fact and judgment on January 20, 1995 (unpublished); Petitioner appealed his three Section 7203 Title 26 misdemeanor federal income tax back-to-back failure-to-file convictions and consecutive 30-month prison term.

He was denied bail, and his appeal was also denied on March 8, 1996, *United States v. Dubin*, 77 F.3d 490 (9th Cir. 1995) (unpublished).

This Court denied *certiorari* on October 7, 1996, *Dubin v. United States*, 117 S.Ct. 188 (1996) (No. 96-232).

On January 21, 1997, after his release, Petitioner filed a Rule 33 new trial motion, moving also to disqualify the Honorable Manuel L. Real, who denied both motions on April 7, 1997 (unpublished); Petitioner appealed.

Another panel of the court of appeals denied the appeal on January 8, 1998, *United States v. Dubin*, 133 F.3d 929 (9th Cir. 1998) (unpublished); a rehearing was requested on January 19, 1998 (Sunday excluded) and denied on March 30, 1998, in a slightly amended order, *United States v. Dubin*, 1998 U.S. App. LEXIS 6484 (unpublished).

This Petition is filed pursuant to Section 1254(1) of Title 28 and Supreme Court Rules 10, 13, 30(1), challenging Judge Real's denial of disqualification and a new trial.

II. AUTHORITATIVE PROVISIONS

The principal governing provisions of law, set forth in the Appendix, are as follows:

The Fifth Amendment (due process of law), The Sixth Amendment (right of confrontation), Section 144 of Title 28 (judicial bias or prejudice), Section 455 of Title 28 (judicial disqualification), Judicial Canon 3(A)(4) (*ex parte* communications), Judicial Canon 3(C)(1)(a) & (d)(iii) & (iv) (appearances of impropriety), and Rule 33 of the Federal Rules of Penal Procedure (new trial in interest of justice).

III. STATEMENT OF THE CASE

This is a case of overwhelming national importance. In recent years, Congress has come under increasing criticism, for example, for the proliferation of virtually incomprehensibly written tax laws, especially those subjecting our citizens to criminal penalties, as more recently has the IRS for its abusive enforcement practices, in a series of *tip-of-the-iceberg* Congressional hearings.

Little attention, however, has been focused on the special supervisory role of the federal judiciary in policing the promulgation and enforcement of such laws, for the protection of individual liberty in such contexts is principally *your* responsibility -- not that of Congress or its agencies.

This case, perhaps more than any other to come before this Court, illustrates the urgent need for increased judicial supervision and new leadership from this Court.

Petitioner, an attorney, now 60, with an otherwise unblemished personal and professional background, was charged by Information on August 13, 1993, of allegedly willfully failing to file timely 1986, 1987, and 1988 federal income tax returns.

Petitioner, was convicted of three Section 7203 Title 26 misdemeanors during a brief, less than two-day bench trial on September 13 and 14, 1994, fined $131,685.71, and sentenced consecutively to 30 months imprisonment on January 20, 1995, by district court judge Manuel L. Real.

Judge Real, while visiting in Hawaii to preside over the Marcos multidistrict civil trial, on the eve of trial hand-picked Petitioner's case from the trial calendar, with seniority taking the case abruptly away from the assigned magistrate who was to have presided by local rule and by jury-waived agreement of the parties at arraignment, who quickly *prejudged* the case as "very, very simple".[1]

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[1] Audio Reporter's Transcript of Proceedings ("RT") 9/13/94, p. 6.

1. Petitioner Was Tried And Convicted Based Upon Secret, False, *Ex Parte* Prosecutorial Hearsay.

Trial had been set for August 1994, but Petitioner, representing himself, became ill with chronic back pain in April, which worsened in July, causing the presiding magistrate in late August to grant a continuance, based on medical reports, finding him "excusably unprepared":

> [F]ailure to grant it would make the continuance of proceedings impossible due to the health of the Defendant, and would deprive the Defendant of counsel of his choice and reasonable time necessary for effective preparation.[2]

Follow-up medical evidence revealed that Petitioner's back problems were still severe, making it impossible for him to prepare for trial in September; additionally, Petitioner's only son, in his senior year at U.S.C., just before his arraignment had died of AIDS after struggling four months in intensive care, causing Petitioner to suffer from recurring bouts of severe depression.

Petitioner sought a brief, one-week continuance in late August in order to retain counsel, but Judge Real, lecturing the magistrate, scoffed at Petitioner's request and refused to grant a further continuance, although counsel, hired to secure a continuance, told Judge Real Petitioner was ill and "was incompetent to act as his own attorney".[3]

Petitioner then consulted with his physician, Dr. deVegvar, who, as his condition worsened, decided on an emergency basis to admit him to the hospital prior to trial:

> I evaluated Mr. Gary Dubin on September 9, 1994 at which time he was feeling depressed and [had] accompanying passive suicidal ideation . . . Mr. Dubin was suffering from Major Depression result-

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[2] Order 8/22/94.

[3] RT 9/12/94, p. 2; his non-evidentiary hearing lasted five minutes.

> ing from his son's death two years ago with increase in depressive symptoms over the past several weeks. . . . [T]he death of a child is one of the most devastating events a human being may experience and it may take years to recover from such a loss. . . . Mr. Dubin did not and could not admit himself. It was my judgment.[4]

Judge Real, told immediately of Petitioner's hospital admission, ordered government doctors to examine Petitioner.[5]

Before government doctors could arrive, the prosecutors telephoned Dr. deVegvar, who informed them that she was the admitting physician, and they then bullied her into disclosing Petitioner's medical condition, learning from her that she had admitted him for one to two weeks.[6]

The Prosecutors then contacted a Dr. Wakuzawa in Queen's emergency room, who knew nothing of Petitioner's hospitalization, only that his department had taken an emergency spine x-ray.

Then the prosecutors, knowing the actual facts as to his admission from Dr. deVegvar, nevertheless sent Judge Real a telephone message through his law clerk that morning that Petitioner was faking his illness and was well and was being discharged from the hospital.[7]

Upon receiving that false message, Judge Real rescinded his examination order, had Petitioner arrested at the hospital and brought to trial immediately in handcuffs.

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[4] 12/22/94 Medical Report; Motion 1/13/95, exhibit 2, pp. 1-2.

[5] RT 9/13/94, p. 2 ("he's at Queen's Hospital").

[6] RT 1/13/95, p. 6; 12/22/94 Medical Report, supra, p. 2.

[7] Admitted in Government's 1995 Answering Brief, p. 27.

Petitioner only learned of that secret communication three months after trial when the probation department revealed what had happened in Paragraph 24 of its draft PSR:

> According to AUSA Osborne, when he called Queen's Medical Center to make arrangements for the Government to examine the defendant, he was advised by the duty doctor that the defendant was being discharged because he had no physical medical condition that would allow him to remain in the hospital. Subsequent to receiving this information from AUSA Osborne, the Court found [*in absentia*] that the defendant was physically and mentally fit to participate in the non-jury trial, and immediately issued a no bail warrant [bracketed words supplied].

First, Dr. Wakuzawa was not the hospital's "duty doctor" and as he later would confirm he was not even aware that the Petitioner had been admitted to the hospital.[8]

Second, Judge Real made no such inquiry into Petitioner's health whatsoever, welcoming him in handcuffs straight from the hospital with only "All right . . . you're here".[9]

Ironically, seeing Petitioner, while incarcerated, the following year, Judge Real was more forthright: "You look a lot better than you did before. You sound a lot better."[10]

Third, Judge Real even ignored the fact that Petitioner was medically sedated, and even though the prosecutors felt sufficiently concerned themselves about his condition to bring that to Judge Real's attention:

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[8] RT 1/9/95, p. 6.

[9] RT 9/13/94, p. 4.

[10] RT 5/10/95, p. 5.

> MR. OSBORNE: Was the Court advised of a problem with medication? THE COURT: Yes, we have no written prescription, or dosage, or anything from the hospital, so I'm not going to get involved in that kind of a situation. We don't know what the medication is about or anything else.
>
> *Compare with 9/13/94 Hospital Notes*: Now taking Zoluft and Ativan . . . Cognition-impaired concentration. Patient taken by Marshals from Hospital without being discharged.[11]

Fourth, Petitioner was arrested and confined during trial, yet Judge Real paid no attention to the effect of such confinement on Petitioner's ability to defend himself, not being allowed to make calls, contact witnesses, do research, or even sleep:

> MR. DUBIN: I just don't feel capable of cross-examining . . . . Last night, after I left this court, I had an hour and a half in transportation; about an hour and a half waiting around in a cell while I was strip-searched and processed; another half an hour here before we left; got to my cell, which is a concrete – almost like concrete slab with a light overhead, at about 7:30. Nine o'clock you go to sleep there with a light over your head. Woke up about 6:00. I couldn't sleep under those conditions. . . . THE COURT: Lawyers always work without sleep, Mr. Dubin.[12]

Fifth, after trial, when, at sentencing, the true medical facts surfaced, Judge Real angrily sought to discredit Petitioner's admitting physician, Dr. deVegvar,

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[11] RT 9/13/94, p. 26;12/22/94 Medical Report, supra.

[12] RT 9/14/94, pp. 18-19.

debunking her credibility even before she could testify or he even saw her face:

> THE COURT: [She's] given a report and I've read that report, and I've read the notes and I just don't think she's candid. I think it is made up. Okay? MR. CASSIDAY: Well, Your Honor, I think I should call her to --. THE COURT: Be my Guest.[13]

Knowing Judge Real's volatile reputation, the prosecutors with their false *ex parte* report literally spun him like a toy top.

Judge Real continually scoffed and harangued at Petitioner's credibility throughout the trial, prejudging the entire case, over and over again yelling: "There was no reason that you went to the hospital except to escape trial".[14]

And, at sentencing, for that reason, despite all the medical evidence being to the contrary, he even enhanced Petitioner's sentence by several months for supposedly checking himself into the hospital while well.[15]

2. Petitioner Was Tried And Convicted Without Being Allowed Access To His Files For His Defense.

The worst prejudice that resulted from Judge Real's reliance upon such secret *ex parte*, out-of-court evidence was that -- having been arrested in his hospital robe and taken directly to Judge Real's courtroom less than a mile away, and incarcerated during recesses and overnight -- Petitioner had no tax or case files or trial exhibits with him for his defense, nor could he call witnesses or do research.

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[13] RT 1/13/95, p. 4.

[14] RT 9/13/94, p. 103.

[15] Finding of Fact No. 34.

When the prosecutors in the middle of trial themselves felt the need to raise the issue with Judge Real, recognizing the farce of trying a criminal defendant without allowing him access to his files, Judge Real, permitting the trial to nevertheless proceed, tried to downplay the problem:

> THE COURT: A pen and paper, Mr. Dubin [the prosecutor provides a pen and paper]. What we want you to do is write a note authorizing your friend to . . . go get the exhibits which you left at home. . . . MR. DUBIN: Your Honor, can I say on the record that my ability to prepare at all at the trial of this matter would enable me to have access to my records, . . . my office files, hardly the kind of thing that I would have at a jail lock-up. THE COURT: No, it's a little late for that. . . . No, you had the documents at home and we will get the documents . . . and any notes that you may have on them, and they will be delivered to the detention center so that you can do whatever you want with those documents. . . . All right, sir, would you do that? Would you get that note and get those materials for Mr. Dubin? . . . All right, Mr. Clements.[16]

When, however, Petitioner continued to complain about his files, Judge Real showed only punitive disinterest:

> THE COURT: 9:00 o'clock tomorrow morning, Mr. Dubin. . . . MR. DUBIN: For me to properly prepare this case I have to have access to a number of files . . . THE COURT: Mr. Clements has gone to your house to get them --. MR. DUBIN: No, that's not in there, Your Honor. THE COURT: -- and he can bring them to wherever the marshals are going to place you and take care of that problem. MR. DUBIN: Your Honor, it's not in that area where I -- . THE COURT: Well, Mr. Dubin, I can't help that. You had -- since

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[16] RT 9/13/94, pp. 32-36.

January you've had all of these records with which to prepare for trial. Again, as I tell you, this is not Burger King.[17]

The obvious prejudice resulting from the absence of access to a defendant's files in a criminal tax prosecution should hardly require comment.

Petitioner's defense was based upon the absence of al three elements necessary for a successful Section 7203 prosecution:

1. that he had no duty to file timely returns in 1986-1988 because he had no individual gross income;

2. that he nevertheless did file informational returns which satisfied Section 6011 requirements; and

3. that any failure to file timely returns on his part was in any event not willful, and hence not criminal.

Without his complete files, especially his tax records, it was virtually impossible for the Petitioner to defend himself, although Judge Real did give him the court's copy of the Government's partisan trial exhibits the first day of trial, and did allow him to introduce into evidence a few exhibits in the court's case file in one of Petitioner's early 1993 pretrial motions the second and final day of trial.[18]

Having always prepared his own returns, for instance, and having filed virtually every year of his adult life before this ordeal, Petitioner had formed the belief from IRS publications that his duty to avoid delaying filing his tax returns as a sole practitioner was based upon his *net business income*, not his *gross receipts*.

Like many taxpayers, the Petitioner had always referred to the IRS' own annual "Tax Guide For Small Business" in preparing returns, which had consistently

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[17] RT 9/13/94, p. 106.

[18] RT 9/13/94, p. 15; RT 9/14/94, p. 116.

explained – at least until after Petitioner's trial when the language therein was suddenly changed – to subtract costs from *business gross* when calculating one's *individual gross income* -- which is what triggers a filing duty to this day:

> If you are a sole proprietor, figure the net income or loss from your business on Schedule C (Form 1040). If your business has a net loss, it generally can be deducted from other income when figuring your gross income.[19]

That method of calculating individual gross income was reinforced in Petitioner's mind by the very structure of Form 1040 historically, which instructed Schedule C taxpayers, and still does, to total *individual gross income* by *adding* to wages business income *or loss*.[20]

And, Petitioner's view was further reinforced by Form 1040 "who must file" instructions, requiring filing "if you have net earnings from self-employment income of at least $400".[21]

Petitioner, in fact, had had a history of delaying filing returns in years he had no net earnings; for instance, ten years before being prosecuted Petitioner had delayed filing his 1982 return until October 15, 1984, telling the IRS his income was "less than the amount required for filing" on its inquiring Form 4901, and why, writing in "self-employed income below amount required for filing (loss)", and was never informed his understanding was in any way wrong.[22]

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[19] Defendant's (1993 Motion) Trial Exhibit 1(5) (1984 IRS Guide),

[20] Id., 1(4) (1986 IRS Form 1040).

[21] Id., 1(2) (1983, 1988, 1989 IRS Form 1040 instructions).

[22] Id., 1(3) (1982 IRS Form 4901 inviting non-filing explanation).

The issue was never whether Petitioner would file, but only if he would delay filing in years with no net earnings, for he would always file Form 1040s even with losses eventually, to track depreciation, carry forward losses, meet lender requirements -- while always informing the IRS he had had no income in such years on Form 4868, subsequently on Form 8176 routinely for decades:

> *1986:* "no net income"
> *1987:* "I did not file a return because I believe that my professional income was below filing requirements"
> *1988:* "net earnings from self-employment income below and before filing requirement"[23]

Moreover, Petitioner did not rely on IRS silence alone, for when its Fresno Office received bank-interest reports and questioned him on the whereabouts of his Form 1040s for years in question, Petitioner explained, was told:

> We received your letter concerning Form 1040 for the tax periods ending December 31, 1985 and 1986. We have corrected our records to show that you are not required to file for 1985 and 1986 Form 1040. The reason this problem occurred is because your bank has the interest as individual income and it should be reported as business income. We apologize for the delay in responding and any inconvenience we may have caused. Sincerely, Julia Moreau, Tax Examiner.[24]

Yet, Petitioner was charged, tried, convicted, and sentenced based on *business gross receipts*, which included such items as unearned retainers, loans, pass through payments for clients to other firms and vendors with

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[23] Id., 1(7-9); see also Government Trial Exhibit G, pp. 2-3.

[24] Id., 1(6); same notices received for 1987, 1998 years, id., 1(7-9).

no premium added, trust funds, costs of utilities, books, offices, computer research, and depreciation.[25]

Actually, Petitioner's tax records which he was not allowed access to at trial showed he had lost nearly $400,000 in the years he was prosecuted for, which returns he would have filed had he not been preoccupied with attempting to comfort, care for, and save his son's life.[26]

Judge Real, however, was not interested in such facts, for when, at sentencing, where the length of sentence is supposed to be determined under the Guidelines by the Government's loss, Petitioner brought 13 boxes of his relevant tax records to court he had been denied access to at trial, but Judge Real refused to even consider them:

> No, you can't admit them into the record. We're not trying the case now. That's been tried, and the record has been made, Mr. Dubin.[27]

Moreover, the Petitioner had not only obeyed IRS directions. He was in the IRS offices being preliminarily audited for 1986, 1987, and 1988, in conjunction with a full-scale field audit being conducted for 1984, prolonged time-wise due to his son's illness and eventual death, *before any returns for those three years in question were even due!*

In the local IRS offices, Petitioner and his examiners watched the filing deadlines for 1986, 1987, and 1988 run out – years in which he had no net earnings, had told the examiners prospectively that he would be delaying filing and why, and had never been told he was wrong, which one examiner had to admit under oath before Judge Real:

> MR. DUBIN: Did you in any way, in writing, or orally at any time, when I told you about why I

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[25] Motion 2/24/97 (1985-1988 tax records excluded at 1994 trial).

[26] Ibid.

[27] RT 1/13/95, p. 36.

> didn't feel I had a filing duty, I think to use your words before, did you tell me that I was incorrect? MS. NAKASONE: No, I did not. MR. DUBIN: Did you tell me I had made a mistake? MS. NAKASONE: No, I did not. MR. DUBIN: Did you encourage me to do any research on the subject? MS. NAKASONE: No, I didn't.[28]

This was no ordinary case from the start, as the ruthlessness of Petitioner's prosecution did not begin with Judge Real, whom this case was steered to by someone, following a last-minute Government continuance request.

The office Information ignored Petitioner's sole proprietor status, making it appear that he had been hiding take-home pay those three years amounting to $1,643,900 – what was actually his total office business gross receipts.

And, adroitly capitalizing on such exaggerated figures to hang a controversial, high profile attorney in public, whose civil litigation, for instance, for clients against IRS officials in the past had not endeared him to everyone, the local IRS "Information Office" even issued a false "news release" on arraignment day that crippled Petitioner's law practice and therefore his means of paying for his defense.

The IRS went out of its way to make it appear in a highly deceptive press story that Petitioner's prosecution was for felony tax evasion and had been scrutinized by a grand jury, when later, according to the magistrate, the referenced indictment was unsuccessfully "never returned" by the grand jury, and for obvious reasons:

> a Federal Grand Jury indicted Dubin earlier this month, for failing to file income tax returns for 1986, when his income was $530,511, for 1987, when his income was $634,100, and for 1988, when his income was $479,289.[29]

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[28] RT 9/14/94, pp. 48-49 ("went on throughout audit", id., 40).

A fair trial for this Petitioner, with his files, was clearly not a high priority on the agenda of either Judge Real or the IRS or these prosecutors.

3. Petitioner Was Convicted Based Upon False Findings Of Fact Given Sweeping Due Deference On Appeal.

This case should provide this Court with new insight into the fairness of the federal appellate process in circumstances where a district court judge is so personally committed to convicting a defendant that he is willing to falsify his findings to defeat an appeal.

At first glance, an appeal in Petitioner's case appeared relatively easy.

First, Judge Real clearly committed reversible error, despite this Court's heroic groundbreaking efforts in *Cheek v. United States*, 498 U.S. 192 (1991), to inject some due process sanity into the application of Section 7203 as a specific intent proscription, by literally stretching to ignore Petitioner's obviously strong good faith reliance defense:

> You're enough of a lawyer that knows there's no estoppel against the government by reason of what some employees might do or don't do, okay?[30]

Second, the trial transcripts themselves clearly record that Petitioner, as Judge Real himself was forced to acknowledge on the record numerous times, did not have his files the first day when most of the government witnesses testified, nor thereafter.[31]

Third, the probation department in its PSR for the first time formally revealed clearly the before-trial secret *ex parte* prosecutorial hearsay communicated to Judge Real

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[29] See Motion 9/20/93; RT 9/20/93, p. 24 (magistrate's disclosure).

[30] RT 9/13/94, p. 13.

[31] RT 9/13/94, pp. 32-36; see, e.g., p. 8 of Petition for quotations.

that triggered his contemptuous wrath at trial, in violation of every governing ethical standard imaginable, explaining his star chamber tactics in retaliation for his false perception that Petitioner had been running away from him, which when challenged was never once denied by Judge Real.[32]

Fourth, the transcripts themselves also show that Judge Real could not even remember material testimony; arguing with Petitioner from the bench, he repeatedly lapsed into forgetfulness, contradicting even government trial exhibits admitted into evidence, continuing to claim, with intransigence, for instance, on perhaps the most material good-faith issue in the case, contrary to fact:

> THE COURT: You were not in the IRS office until after you had not filed '86, '87 and '88 returns. MR. DUBIN: All right. Your Honor, that is incorrect. . . . THE COURT: -- that may be incorrect, but it's in the record, Mr. Dubin. MR. DUBIN: May I show you the letters? THE COURT: No, I don't propose you to show me that.[33]

However, the result of either gross personal bias or the product of a stubborn jurist incapable of admitting he was wrong, Judge Real -- four months after trial – upon completing sentencing entered findings of fact contradicting in most respects what had actually occurred, none the least of which in importance was his Finding of Fact No. 11, seeking to hide his having tried Petitioner without his files:

> DUBIN complained that he did not have his records. Those were brought to him during the morning of September 13, 1994, by a friend, also a lawyer, and those records were available to DUBIN throughout the trial. During the trial DUBIN referred to his records and what they contained.

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[32] See pp. 3-7 of Petition.

[33] RT 1/13/95, p. 35.

Without Petitioner having had access to his files, all of Judge Real's findings supporting conviction and sentencing, based on proof at trial, must necessarily fall.

Perhaps Petitioner in his first appeal tactically should have more wisely concentrated solely on just a few of those more obvious evidentiary abuses.

But, writing his briefs from his prison cell, he decided to focus on the entire plethora of constitutional violations he suffered, including for instance:

1. having been exposed on each of two counts, due to the addition of supervised release, without being indicted, contrary to Rule 7(a), F.R.Cr.P., and arguably the Fifth Amendment, to prison terms each in excess of one year, which he still submits was and remains unconstitutional;

2. having been charged and convicted based upon an erroneous interpretation of an at best unconstitutionally vague and ambiguous tax code filing requirement, which he still submits was and remains a jurisdictional bar to his prosecution in the first place; and

3. having had his subjective intent reliance evidence ignored, contrary to this Court's decision in *Cheek*, *supra*.[34]

His first appellate panel, led by retiring Judge Cecil Poole, perhaps due in part to the limited time Ninth Circuit panels are allocated for such cases, as he left active service treated Petitioner's first appeal remarkably as apparently merely just another failure-to-file waste of time, and affirmed, surprisingly giving sweeping due deference to every one of Judge Real's contrary-to-the-record findings without any *de novo* inquiry whatsoever.

Judge Poole, for instance, even ignored the fact that the record conclusively showed Petitioner did not have his files as a result of prejudicial *ex parte* prosecutorial communications with Judge Real, refusing even to discuss

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[34] Those earlier issues are not however the focus of this Petition.

the merits of those confirmed, admitted, and related events, merely concluding, in one sentence, cavalierly disregarding the actual record, and without explanation:

> We reject as frivolous Dubin's unsubstantiated claims of misconduct by either the district judge or the prosecutor.[35]

Even worse, Judge Poole ignored the fact that Judge Real had specifically rejected as barred Petitioner's good-faith reliance claim, as an improper "estoppel against the government", and had refused to weigh that evidence in its entirety, along with Petitioner's also compelling and documented good-faith reliance on IRS forms and instructions -- his first appellate panel merely concluding, again with sweeping disinterested due deference:

> The record, however, does include evidence that the IRS, in response to letters from Dubin stating that his net income fell below $400 for the years in question, sent him notices indicating that he was not required to file tax returns. The district court *apparently* weighed this evidence, and Dubin's contention that he relied on the IRS notices against the government's evidence. (Italics added).[36]

4. Petitioner Was Unfairly Denied A New Judge And A New Trial Based Upon Newly-Discovered Evidence.

If anything is certain, it is certain that Petitioner had complained about not having his files at trial; the trial transcripts confirm that, Judge Real in his Finding of Fact No. 11 confirms that, as do his briefs in his first appeal.[37]

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[35] Unpublished Memorandum 12/22/95, p. 9.

[36] Id., p. 5; Petitioner's first cert. petition was also unsuccessful.

[37] RT 9/13/94, pp. 32-36; Petition, p. 15.

Then, upon Petitioner's returning to Honolulu from three Mainland prisons, in late 1996 attorney James Clement – the "friend" who Judge Real during trial on Monday, September 13, 1994, ordered to go to his residence and bring him his files for the last few hours of trial the next day, Tuesday, – telephoned Petitioner from New York State, having heard he had returned.

Mr. Clement for the first time gave him the complete details, not previously known, later included in a Declaration, as to how he had gone to Petitioner's residence the afternoon of September 13, 1994, picked up the wrong files, returned to the courtroom that first day, finding everyone gone:

> I currently reside in Ithaca, New York. . . . I returned to Honolulu at the end of the summer in 1994, and I sat as a visitor at Mr. Dubin's tax trial on both days . . . . Judge Real called me to the podium and instructed me to get Mr. Dubin's files for him. . . . I left the courtroom at . . . about 1:30 p.m., went to Mr. Dubin's house, which was . . . forty minutes away, found two boxes of materials that appeared to be related to the tax case, and returned that day after the trial had adjourned, at approximately 5:00 p.m.
>
> When I reached the courthouse, Mr. Dubin was gone, apparently taken to Halawa prison for the night. I inquired at the U.S. Marshals' office in the courthouse whether I could bring the case materials to Mr. Dubin, and I was told that I could not since I was not his attorney. I was instructed by the Judge's clerk to leave the case materials with them and that they would give them to Mr. Dubin the next morning for the second day of trial. . .
>
> Only later during trial did I discover from Mr. Dubin that I had brought him only a duplicate set of Government's Exhibits and none of his case or tax files.

> In preparing this Declaration, I requested copies of various documents from Mr. Dubin. . . .which I have never before seen. In Finding of Fact No. 11, Judge Real states that Mr. Dubin had his records "brought to him the morning of September 13, 1994 by a friend, also a lawyer, and those records were available to DUBIN throughout the trial." . . . I know of my own personal first-hand knowledge that Finding of Fact No. 11 is absolutely false.[38]

Two U.S. Marshals at trial sat behind Petitioner, who was jailed during even brief court recesses, and overnight, with instructions not to let "the prisoner" speak to anyone.[39] Petitioner, therefore, had not been allowed to talk, except through gesturing, with Mr. Clement, who returned to New York while Petitioner remained incarcerated at Halawa Prison.

After receiving Mr. Clement's Declaration, which also revealed the prosecutor had been head-signaling testifying Government witnesses during Petitioner's cross-examining, Petitioner filed his new trial motion on January 21, 1997, also seeking Judge Real's disqualification – not only due to his past biased behavior before and during trial, *supra*, but since he would be a material witness as to events now being complained of, including his own false findings of fact.

Waiting until his next regular periodic visit to the District of Hawaii, and refusing to say until the hearing whether he would allow witnesses to testify, Judge Real did not hear Petitioner's motion until March 24, 1997, at which time, refusing even to wait a few days that week so that Mr. Clement, in Ithaca, New York State, with bags pre-packed, could attend, Judge Real, not unexpectedly, summarily

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[38] Clement Declaration filed 1/21/97 (Appendix L).

[39] RT 9/14/94, pp. 18-19, 89.

refused to disqualify himself and denied the motion in its entirety.[40]

At the hearing, Judge Real denied disqualification based upon Petitioner's first appellate panel's conclusory statement that there had been no prior misconduct on his part, *supra*, and because Petitioner had raised the issue of his missing files previously in that unsuccessful appeal -- although logically that panel did not have the benefit of Mr. Clement's eye-witness account, a classic example of how judicial error tends to perpetuate itself notwithstanding mounting evidence to the contrary.[41]

In his written order, adding to the draft prepared by the prosecutor, Judge Real penned-in that there was no "newly discovered evidence" – despite the fact that the falsity of his Finding of Fact No. 11 remained evident on the record (*or is that what he meant*?), now underscored by the sworn statement of the very person who Judge Real claims brought Petitioner his files supposedly at the very start of trial that Monday, who the transcript shows was not even sent to get the files until later that same day.

Petitioner's 1998 appellate panel nevertheless, again without oral argument, affirmed, applying an abuse of discretion standard to Petitioner's claims of constitutional deprivations, concluding:

1. "Dubin's new allegations of bias do not evidence 'a deep-seated favoritism or antagonism that would make a fair judgment impossible,'" quoting this Court's decision in *Liteky v. United States*, 510 U.S. 540, 555 (1994) -- ignoring in the process both the history of his officiating in this case and the falsity of his Finding of Fact No. 11 that he was required to *self*-review in deciding Petitioner's new trial motion, and

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[40] Supplemental Clement Declaration filed 4/8/97 (Appendix M).

[41] See RT 3/24/97, pp. 2, 7-8 (Appendix K).

2. "Dubin waited two years to inform the district court that Clement retrieved the wrong files during trial and to raise his accusation of coaching" -- ignoring the fact that Petitioner had complained to Judge Real on September 13, 1994, that the files he needed were not even at his residence, only his trial exhibits that would in any event be difficult for Mr. Clement to find if he could not speak with him – such permission was nevertheless denied – *and* that Petitioner was incarcerated for nearly two years before hearing from Mr. Clement *and* that regardless no one now disputes that Petitioner did not have his files with which to defend himself that first day of his two-day trial, during at least one-half of his entire criminal trial.[42]

IV. LEGAL ARGUMENT

This Petitioner is probably the first criminal defendant in American history to be tried, convicted, and even to have his prison sentence enhanced, as a result of proven secret, outside-of-court, *ex parte* prosecutorial hearsay testimony given to, and relied upon, by a presiding federal judge.

And, this Petitioner is surely the first criminal defendant in American history to be tried and convicted without being allowed access to his defense files at trial, by a presiding federal judge who for three decades has been notorious for riding out in front of the posse.

If this Court's Rule 10 admonition that "a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law" in any way renders this Petition unworthy, surely it is that criterion that should give way, and not bedrock constitutional guarantees, in favor of this Court's ultimate responsibility for ensuring fair trials in America.

This Court has never before tolerated such injustice.

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[42] 1/8/98 Memorandum, paragraphs 3, 11 (Appendix I).

1. Judge Real's Acceptance Of Secret, False, *Ex Parte* Prosecutorial Hearsay Denied Petitioner His Fifth And Sixth Amendment Fair Trial Rights.

For more than a century, this Court has held that evidence developed against defendants must come from "the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel," *Turner v. Louisiana*, 379 U.S. 466, 472-473 (1965); *Parker v. Glidden*, 385 U.S. 363, 364 (1966); *Pointer v. Texas*, 380 U.S. 400 (1965); In Re Oliver, 333 U.S. 257 (1948); *Kirby v. United States*, 174 U.S. 47 (1899) (overlapping due process guarantees).

As this Court explained through Chief Justice Burger in *Davis v. Alaska*, 415 U.S. 308, 315-318 (1974), quoting earlier Court decisions:

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony can be tested. . . .
>
> Petitioner was thus denied the right of effective cross-examination which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."

Yet, by acting on *ex parte* hearsay that a "duty doctor" had informed prosecutors who in turn informed the court behind Petitioner's back he had been faking his illness and was being discharged from the hospital – in contempt of Judge Real's officiating – he denied Petitioner the means of countering that outside-of-court testimony, precisely contrary to this Court's *Davis* decision, which unfortunately Judge Real acted upon at trial, even enhancing his sentence later for obstruction of justice, analogous to a contempt citation or worse, to Petitioner's acute prejudice.

The drumming up of such false evidence by prosecutors is alarming enough, as this Court has continually stressed; *see, e.g.*, this Court's decisions in

Giglio v. United States, 405 U.S. 150 (1972); *Miller v. Pate*, 386 U.S. 1 (1967); *Napue v. Illinois*, 360 U.S. 264 (1959).

But when acted upon *ex parte* by a federal judge, such conduct takes on still more serious proportions – an ethical dereliction of duty squarely contrary to Canon 3(A)(4) of the Code of Conduct for United States Judges.[43]

Even more ethically shocking still was the fact that Judge Real's attitude toward Petitioner was thereby hopelessly colored by that undisclosed *ex parte* hearsay, to the point where he should not have conducted the trial thereafter, for as this Court in *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971), has held, due process requires a defendant in such situations also not be tried before a judge so obviously inflamed by supposed personal disobedience of him outside his view, analogous to *indirect* contempt.

Here, there was a running controversy, with personal feelings on both sides, between Petitioner and Judge Real throughout trial due to what Judge Real *had been told* about Petitioner running away from him, the type of situation this court has previously found objectionable for a trier of fact to himself judge, *Taylor v. Hayes*, 418 U.S. 488, 501 (1974).

And, although this Court has often divided on whether the same judge charging contempt should also preside at a contempt hearing, *In Re Murchison*, 349 U.S. 133 (1955), what ultimately makes the difference in such cases seems to be whether the charging judge is so emotionally wrapped up in the proceedings that he assumes "the role of prosecutor and undertakes to produce evidence, essential to overcome the defendant's presumption of innocence, *United States v. Karnes*, 531 F.2d 214, 217 (4th Cir. 1976), which is exactly what Judge Real did *ex parte*.

Having been told falsely that Petitioner was running away from trial faking illness, Judge Real drew the inference that Petitioner was guilty and prejudged the entire case.

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[43] See Appendix E (ex parte communications proscribed).

2. Judge Real's Trying Of Petitioner Without Allowing Him Access To His Files Denied Petitioner His Fifth And Sixth Amendment Fair Trial Rights.

Although research, not surprisingly, has failed to uncover a single reported instance in American law where another criminal defendant was tried without access to his defense files, by analogy such a fair trial deprivation clearly comes within the interpretative parameters of this Court's decision in *Cheek v. United States*, 498 U.S. 192 (1991).

In *Cheek*, 498 U.S. at 200, quoting language from this Court's earlier decision in *United States v. Murdock*, 290 U.S. 389, 396 (1933), Justice White, with Justice Scalia concurring, interpreted Section 7203 of Title 26 to require proof of *specific* intent, holding it reversible error therefore to disregard evidence of subjective good faith reliance upon a misunderstanding of the tax code, recognizing the complexity of the our modern tax laws, making failure-to-file *still* the only area of American law where actual ignorance of the law is a complete defense:

> Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct.

And, if a taxpayer has a statutory right to present evidence in his defense negating specific intent, it logically follows that denying him access at trial to such case files similarly would violate this Court's holding in *Cheek*, if for no other reason than evidence of having no tax liability, for instance, has always been recognized to be exculpatory in tax prosecutions, *Lumette v. United States*, 362 F.2d 644, 645-646 (8th Cir. 1966) (tax liability held proper evidence for determining "willfulness" – decided even prior to *Cheek*).

Since "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with

which he is charged," *In Re Winship*, 397 U.S. 35℄, 364 (1970), it necessarily follows that *Cheek* violations also violate due process of law, and denying access to defense files would clearly be an anathema to our Constitution.

Furthermore, Judge Real's cavalier rejection, *supra*, of Petitioner's good-faith reliance on IRS printed forms and instructions and written correspondence and statements and omissions by his examiners were all *Cheek* violations.

In addition to Fifth Amendment concerns, there are at least two Sixth Amendment analogies also applicable.

First, an incarcerated *pro se* defendant's right to have access to research materials and to witnesses during trial has occasionally been considered and affirmed by federal courts, *United States v. Sarno*, 73 F.3d 1470, 1491 (9th Cir. 1995), *cert. denied*, 518 U.S. 1020 (1996) ("we agree that the Sixth Amendment demands that a pro se defendant who is incarcerated be afforded reasonable access to 'law books, witnesses, or other tools to prepare a defense'".)

Second, as Justice O'Connor, writing for the majority in *Strickland v. Washington*, 466 U.S. 668, 692 (1984) explained, not allowing a criminal defendant a right to counsel "in certain Sixth Amendment contexts, prejudice is presumed. . . . Prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost". Surely one such circumstance would be where defense counsel was not allowed to have *his* files at trial.

Why is Petitioner's situation any different?

Jailed during trial, he was not allowed access to his files or research materials or witnesses. Required to act in the dual capacity of both defendant and his own defense counsel, Judge Real having denied him a brief continuance due to illness to retain counsel, as his own attorney he was denied his defense files in that capacity also.

The presumed prejudice in such situations was overwhelming and all-pervasive.

3. Judge Real's Supporting Of His Conviction Of Petitioner With False Findings Of Fact Denied Petitioner His Fifth And Sixth Amendment Appellate Rights.

Once appeals are permitted, criminal defendants have a due process and equal protection *right* to meaningful appellate review; *see Griffin v. Illinois*, 351 U.S. 12 (1956); *Dowd v. United States ex rel. Cook*, 340 U.S. 206 (1951).

That right, however, more often than not, depends for its protection upon the integrity of entered findings of fact, for most standards of review give due deference to the findings of a trial judge, especially those judging credibility.

But what protections are there if a federal judge intentionally falsifies his findings to defeat an appeal?

Here, not only were Judge Real's findings clearly not entitled to the customary great weight Petitioner's two appellate panels placed upon them as the deferential starting point for their review.

Many of Judge Real's findings constituted a clear fraud upon our appellate courts, for the conclusion is inescapable that they were contrived purposefully to conceal what actually transpired so as to defeat Petitioner's appeal.

First, many of Judge Real's findings were not based upon trial evidence, but were merely lifted from hearsay prosecutors had given probation after trial, slipped into the PSR, such as his Finding of Fact No. 22, replete with 1986-1988 business and non-business gross and taxable income and deduction figures (right to the penny!) nowhere introduced or even mentioned once in the actual trial record.

Such partisan, "adopted findings" have never been favored by this Court, justifiably criticized by Justice Douglas in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-657, n.4 (1964), quoting Circuit Judge J. Skelly Wright:

> Many courts simply decide the case in favor of the plaintiff or the defendant, have him prepare the findings of fact and conclusions of law and sign them. This has been denounced by every

> court of appeals save one. This is an abandonment of the [judge's] duty and trust . . . .

When sensitive constitutional rights are implicated, this Court has gone even further, favoring *de novo* review, *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

While other Ninth Circuit panels have on occasion held that "adopted findings" should be carefully scrutinized "by conducting a painstaking review of the lower court proceedings and the evidence", *Photo Electronics Corp. v. England*, 581 F.2d 772, 776-777 (9th Cir. 1978), which is especially true where findings involve mixed questions of law and fact, *United States v. McConney*, 728 F.2d 1195, 1199-1204 (9th Cir. 1984), and questions of constitutional law, *United States v. George*, 960 F.2d 97, 99 (9th Cir. 1992), for some unexplained reason, inconsistently, that was never even attempted in reviewing Petitioner's appeals.

Second, Judge Real's findings were in many instances not simply "adopted". As with his Finding of Fact No. 11, *supra*, they were also completely false, totally contradicted by the trial record itself, yet relied upon as the basis for affirming Petitioner's conviction nevertheless.

Such frankly dishonest efforts to defeat an appeal represent the most dangerous threat to the integrity of the federal judicial process imaginable.

Judges surely are not above the law.

They should be subject to the same type of fraud investigation which Justice Frankfurter found inherent within the power of federal appellate courts where affirmance of a judgment was obtained by fraud, *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1945).

As this Court has reminded us in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1943), an appellate court will fashion whatever equitable remedy is deemed appropriate to undo a fraud committed upon itself, with Justice Roberts concurring "no fraud is more odious than an attempt to subvert the administration of justice".

4. Judge Real's Refusal To Grant A New Trial While Refusing To Disqualify Himself Denied Petitioner His Fifth And Sixth Amendment Fair Trial Rights.

It is axiomatic that a fair hearing in a fair tribunal before a fair judge is *the* basic bedrock requirement of due process of law, *In Re Murchison*, 329 U.S. 133, 136 (1955).

"Every procedure", this Court has cautioned, speaking through Chief Justice Taft in *Tumey v. Ohio*, 273 U.S. 510, 532 (1926), "which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the state and the accused," denies such fairness and offends due process.

In Petitioner's case, once Judge Real was informed by the prosecutors, *ex parte*, that the Petitioner was supposedly trying to escape trial *and him* by faking illness, Judge Real, inflamed, prejudged the entire case before the trial had even begun, concluding apparently that even having his files at trial would be of no value to a guilty man.

Petitioner was arrested at the hospital without being discharged, over the objection of his admitting physician, jailed throughout trial, while ill, depressed, sedated, without sleep, without counsel, without files, without exhibits, without witnesses, without access to law books or a telephone.

All this because of secret (and false) *ex parte* double medical hearsay -- as to what a then unnamed "duty doctor" had supposedly told partisan prosecutors who then relayed that on to Judge Real's law clerk who then told Judge Real – which led Judge Real to conclude *in absentia* that Petitioner was mentally and physically fit for trial and to override the testimony of every physician and private attorney informing him otherwise, notwithstanding decades of contrary directions by this Court, summarized by Justice Stevens in *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996):

> We have repeatedly and consistently recognized that "the criminal trial of an incompetent defendant violates due process". Medina v. California, 505 U.S. 437, 453 (1992); Drope v. Missouri, 420 U.S.

> 162, 171-172 (1975); Pate v. Robinson, 383 U.S. 375, 378 (1996). Nor is the significance of this right open to dispute. As Justice Kennedy recently emphasized: "Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's behalf or to remain silent without penalty for doing so. Drope v. Missouri, 420 U.S. 162, 171-172 (1975)." Riggins v. Nevada, 504 U.S. 127, 139-140 (1992).

Judge Real's subsequent refusal to step aside once the Declaration of James W. Clement, *supra*, was attached to Petitioner's new trial motion, placed him in the ethically untenable position of wanting to judge -- and judging -- *himself*, in clear violation of Section 144 and Section 455 of Title 28 and Judicial Canon C(1)(a) & (d)(iii) & (iv).

The appearance of partiality, in circumstances far less compelling than these, is all that is required for recusal, for the objective is not to discipline judges but "to promote public confidence in the integrity of the judicial process" if "impartiality might reasonably be questioned", as this Court's majority in *Liljeberg v. Health Services Corp.*, 486 U.S. 847, 848 n.7, 859 (1988), explained in extensive detail.

The dissenting opinions in *Liljeberg* questioned the sufficiency of "constructive knowledge" as a Section 455 criterion, a factor not relevant here as Judge Real knew of the offending circumstances. He helped create them.

More recently, this Court extensively revisited that ethical issue in *Liteky v. United States*, 510 U.S. 540 (1994), a changed majority adopting a somewhat different *"extrajudicial source" factor* approach, four Justices preferring an objective *appearance of impropriety* test.

Under either approach, however, Judge Real should have ethically stepped aside.

V. CONCLUSION

Petitioner seeks a judgment of this Court reversing his court of appeals' panel, adopting improved recusal standards, and ordering either a new trial before a different judge or a review *de novo* in the court of appeals consistent with similar appellate rights granted other defendants by this Court in analogous situations, such as in *Ornelas*, *supra*.

Petitioner seeks by this Petition nothing more than an impartial, intelligent review of his case – somewhere – protected from the prejudgments of circuit politics.

As a practicing attorney, and as a result of his 1994 trial, Petitioner has already been subjected to a lengthy three-year Bar ethics investigation routinely conducted by the Disciplinary Board of the Hawaii Supreme Court.

Not surprisingly, that agency, which has always imposed discipline for failure-to-file convictions, recently acquitted this Petitioner of any wrongdoing "due to the unique circumstances" of his case – even though criminal convictions everywhere, including Hawaii, have always been treated as conclusive evidence of wrongdoing.[44]

Cleared by his peers despite conviction by Judge Real, believed to be another first in American legal history, Petitioner now returns to this Court, whose attorney's oath he took in 1973 to defend the Constitution, which he has been trying to do before and ever since, to now sincerely suggest that it is the Constitution's turn to defend him.

Most respectfully,

/s/ Gary Victor Dubin

GARY VICTOR DUBIN
Petitioner

Honolulu, Hawaii
June 29, 1998

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[44] 1/27/98 Decision, filed 2/2/98, Petitioner's 9th Cir. Appeal (1997).

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APPENDIX

A. Fifth Amendment To The United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject to the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. Sixth Amendment To The United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

C. Section 144 Of Title 28 Of The United States Code

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists . . . .

D. Section 455 Of Title 28 Of The United States Code

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding ; . . .

E. Canon 3(A) Of The Code Of Conduct For United States Judges Promulgated By The Judicial Conference

A. (4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding. . . .

F. Canon 3(C) Of The Code Of Conduct For United States Judges Promulgated By The Judicial Conference

C. (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . .

(d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such person: . . .

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(iv) is to the judge's knowledge likely to be a material witness in the proceeding. . . .

G. Rule 33 Of The Federal Rules Of Criminal Procedure

The court on motion of a defendant may grant a new trial to that defendant if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. . . .

H. Order Denying Defendant's Motion To Disqualify The Trial Judge And Order Denying Defendant's Motion For A New Trial -- Filed April 7, 1997

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

United States of America,	)	CR. NO. 93-01434
	)	
Plaintiff,	)	Order Denying Defendant's
vs.	)	Motion To Disqualify The
	)	Trial Judge And Order
Gary Victor Dubin,	)	Denying Defendant's
	)	Motion For A New Trial
Defendant.	)	

ORDER[1]

Defendant's motions to disqualify the trial judge and for a new trial, came on for hearing in the District of Hawaii, on Monday, March 24, 1997, at 10:00 a.m. The defendant, Gary Victor Dubin, Esq., appeared Pro Se. The United States was represented by Assistant United States Attorney Leslie E. Osborne, Jr., Esq. The defendant elected to call no witnesses or present any new evidence. The United

[1] Handwriting added to AUSA draft by Judge Real before entry.

States called Janet Nakasone, IRS Revenue Agent, who had been a principal witness for the United States at the Dubin trial, for the purpose of rebutting the matters set forth in the Declaration of James W. Clement, filed in support of the defendant's motion for a new trial.

I. The Motion to Disqualify the Trial Judge

The defendant presented no evidence other than those matters set forth in his declaration, which amount to a regurgitation of the issues he previously raised on appeal in which the Ninth Circuit held: "We reject as frivolous Dubin's unsubstantiated claims of misconduct by either the district judge or the prosecutor." United States v. Dubin, 77 F.3d 490 (9th Cir.), cert. denied, 117 S.Ct. 188 (1996).

The defendant's unsubstantiated allegations of prejudice will not support a motion to disqualify a trial judge. United States v. Strait, 17 F.3d 306, 307 (9th Cir. 1994).

Defendant's motion is simply legally insufficient.

For the foregoing reasons, the defendant's motion to disqualify the trial judge is DENIED.

II. Motion for a New Trial

The defendant filed a motion for a new trial on January 21, 1997, in which he raises issues that were presented in an earlier motion for new trial, which was denied and also raised in his appeal to the 9th Circuit in United States v. Dubin, supra. The defendant's only allegation of new evidence was predicated upon the declaration of James W. Clement, who alleged that the prosecutor had signaled government's witnesses in an effort to induce certain replies on cross-examination. That allegation was totally repudiated by testimony produced at the hearing. The Court notes that Mr. Clement had more than ample opportunity to bring his recent allegations of impropriety to the attention of the defendant during trial. In addition, the Court observed nothing during the trial to corroborate the defendant's present allegations. The

defendant's allegations of misconduct by the prosecution are without any credible evidence to support them. The defendant had failed to raise any other new matters in his pleadings, and had not presented any indication of the existence of newly discovered evidence, material to the issues involved in this trial. United States v. Boschette, 794 F.2d 416, 418 (9th Cir.), cert. denied, 479 U.S. 889 (1986); nor has he shown any evidence that would suggest a new trial would probably produce a different result. United States v. Davis, 960 F.2d 820, 825-27 (9th Cir.), cert. denied, 113 S.Ct. 210 (1992).

None of the allegations made by defendant constitute newly discovered evidence.

For the foregoing reasons, the defendant's motion for a new trial is DENIED.

DATED: April 2, 1997, Honolulu, Hawaii.

Real

MANUEL L. REAL
United States District Court Judge

I. Ninth Circuit Unpublished Memorandum – Filed January 8, 1998

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States of America,	)	No. 97-10161
	)	D.C. No.CR-93-01434-MLR
Plaintiff-Appellee,	)	
	)	MEMORANDUM
v.	)	
	)	
Gary Victor Dubin,	)	
	)	
Defendant-Appellant.	)	

Before: BROWNING, PREGERSON, and HAWKINS, Circuit Judges,

The parties are familiar with the factual and procedural history, and we will not recount it here except as necessary to clarify our decision.

We affirm the district court's denial of the Defendant's motion to recuse the district court judge, motion for a continuance, and motion for a new trial for the following reasons:

1. Denial of a motion for recusal is reviewed for an abuse of discretion. See Mayes v. Leipziger, 729 F.2d 605, 607 (9th Cir. 1984).

2. A judge is only required to recuse himself for non-extrajudicial reasons "in the rarest circumstances." Liteky v. United States, 510 U.S. 540, 555 (1994).

3. Dubin's new allegations of bias do not evidence "a deep-seated favoritism or antagonism that would make a fair judgment impossible." Id. Accordingly, the district court judge did not abuse his discretion in refusing to recuse himself.

4. A district court's decision to deny a request to continue a hearing is reviewed for an abuse of discretion. See United States v. Flynt, 756 F.2d 1352, 1358 amended by 764 F.2d 675 (9th Cir. 1985).

5. In reviewing whether a district court abused its discretion by denying a continuance, we consider due diligence of the movant, inconvenience to the participants, usefulness of testimony, and the presence of actual prejudice. See United States v. Mejia, 69 F.3d 309, 314-15 (9th Cir. 1995).

6. All four factors weigh against Dubin. Dubin failed to bring his witness, James W. Clement, to the hearing.

The presiding judge was in Honolulu specifically to hear Dubin's motion for a new trial [amended by Order entered March 30, 1998, Appendix J]. Having presided over the underlying trial, the judge could evaluate first-hand the information contained in Clement's declaration. Lastly, we view Clement's declaration as highly suspect because he failed to timely make known to the court his suspicions of misconduct.

7. A district court's denial of a motion for a new trial for prosecutorial or judicial misconduct is reviewed for abuse of discretion. See McClaran v. Plastic Indus., 97 F.3d 347, 359 (9th Cir. 1996) (prosecutorial misconduct); United States v. Laurins, 857 F.2d 529, 537 (9th Cir. 1988) (judicial misconduct).

8. Neither the district court nor Dubin was aware of any misconduct occurring during the trial. Moreover, the government witness testified under oath at the hearing for the motion for a new trial that she had not been coached, that her trial testimony was her own, and that she was unaware of any misconduct occurring at trial.

9. Denial of a motion for a new trial on the ground of newly discovered evidence is reviewed for an abuse of discretion. See Lindsey v. United States, 368 F.2d 633, 636 (9th Cir. 1967).

10. To warrant a new trial based on newly discovered evidence, the evidence must be newly discovered, material, likely to produce an acquittal, and diligently discovered. See United States v. Walgren, 885 F.2d 1417, 1428 (9th Cir. 1989).

11. Dubin waited two years to inform the district court that Clement retrieved the wrong files during his trial and to raise his accusation of coaching. As such, Dubin failed to exercise due diligence on either claim.

12. We need not address Dubin's claims regarding due process, indictment procedures, and federal tax code interpretations as these issues were disposed of in the earlier appeal. See United States v. Redd, 759 F.2d 699, 700-01 (9th Cir. 1985) (per curiam).

AFFIRMED.

J. Ninth Circuit Unpublished Order – Filed March 30, 1998

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

United States of America,	)	No. 97-10161
	)	D.C. No.CR-93-01434-MLR
Plaintiff-Appellee,	)	
	)	Order Amending Disposition
v.	)	And Denying Petition For
	)	Rehearing En Banc
Gary Victor Dubin,	)	
	)	
Defendant-Appellant.	)	

Before: BROWNING, PREGERSON, and HAWKINS, Circuit Judges.

The memorandum disposition filed on January 8, 1998 is amended as follows: Delete the second full sentence in paragraph 6, page 2 and replace with: "The presiding judge traveled from the Central District of California, Los Angeles to Honolulu to hear Dubin's motion for a new trial."

With this amendment, the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote

on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

K. Transcript Of Proceedings -- March 24, 1997

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

United States of America,	)	CR. NO. 93-01434MLR
	)	
Plaintiff,	)	
vs.	)	
	)	
Gary Victor Dubin,	)	
	)	
Defendant.	)	

The above-entitled matter came on for hearing on Monday, March 24, 1997, at 10:05 a.m., at Honolulu, Hawaii,

BEFORE: THE HONORABLE MANUEL L. REAL
United States District Judge
District Of Hawaii

[APPEARANCES]

MONDAY, MARCH 24th, 1997 10:05 A.M.

THE CLERK: Criminal Number 93-01434MLR, United States of America versus Gary Dubin. This case is called for defendant's motion for a new trial.

MR. OSBORNE: Good morning, Your Honor.

Les Osborne, with Chuck Banfe, for the United States.

MR. DUBIN: Good morning, Your Honor. Gary Dubin, movant.

THE COURT: All right, we'll first rule on the question of the recusal. On the basis of the opinion of the Court of Appeals, in United States of America versus Gary Victor Dubin, that the conduct of the prosecutor and the judge were not detrimental to Mr. Dubin, that motion is denied.

Now, we'll take up the motion for new trial. Do the parties have anything to add to the documents which have been filed?

MR. DUBIN: No, Your Honor, just to call to your attention that it's expensive to bring Mr. Clement here, and I ask the court for an evidentiary hearing; I would like to bring him here for that purpose. I just wanted to put that on the record, and remind the court.

MR. OSBORNE: The United States is prepared to proceed today, Your Honor.

THE COURT: Al right, anything to add to the documents which have been filed? Anything to add, at all? Any testimony or any other matters?

MR. OSBORNE: The United States is prepared to call Ms. Nakasone, Your Honor. She was a witness at the trial.

THE COURT: All right.

MR. DUBIN: Your Honor, I would just to call to your attention, I talked to the clerk here, who apparently talked to your clerk, and was told Your Honor could not decide on whether there would be an evidentiary hearing until the hearing. And I explained it's very expensive to bring Mr. Clement. He is standing by. If you are going to have an evidentiary hearing, then I would ask that we have a continuance so I can bring him –

THE COURT: No, I think there's not enough in Mr. Clement's declaration, since he was here during trial, and it's on quote, "newly discovered evidence," and he was here

during the trial and could have told you about anything that was going on during the trial, and, at least from observations of the court during that trial, he did, okay? All right.

MR. OSBORNE: The United States would call Ms. Janet Nakasone.

MR. DUBIN: Your Honor, I object, because it's unfair, because I was told by your clerk that you couldn't make a decision on an evidentiary hearing –

THE COURT: No, the clerk told you that the hearing on the motion was going to be today. That's want the clerk told you, Mr. Dubin.

MR. DUBIN: Your Honor, I put in the record what the court told me, in my declaration.

THE COURT: All right.

(Ms. Nakasone approach the witness stand.)

THE CLERK: Please raise your right hand.

Do you solemnly swear the testimony you are about to give at this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

THE CLERK: You may be seated.

Please state your name for the record and spell your last name.

THE WITNESS: Janet Nakasone, N-A-K-A-S-O-N-E.

JANET NAKASONE

called as a witness on behalf of the government, having been produced and duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. OSBORNE:

Q. And, who do you work for, Ms. Nakasone?

A. The Internal Revenue Service.

Q. As a revenue agent?

A. Yes.

Q. And, did you testify at the trial of Mr. Dubin, on September the 14th, 1994?

A. Yes, I did.

Q. Prior to your taking the stand, were there any discussions with anyone concerning signals, or coaching that you might have received, during your testimony?

A. No, there were not.

Q. At any time during your testimony, did you received any signals, or coaching, of any kind?

A. No.

Q. Were any of the answers that you gave the product of anyone else, other than your own recollection?

A. No.

MR. OSBORNE: I have no further questions.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. DUBIN:

Q. Ms. Nakasone, have you testified before in criminal trials on behalf of the Internal Revenue Service?

A. Yes, just that trial in September.

Q. Okay, well, other trials, as well?

A. Other trials, no.

Q. No?

A. No.

Q. Have you participated in any criminal investigations as a witness?

A. Other than the September trial?

Q. That's right.

A. No.

Q. Do you recall a discussion you had with me during the 1984 year audit when you told me you had been criticized because of the way you had treated certain matters that went into the Criminal Investigation Division?

MR. OSBORNE: Objection, Your Honor.

THE COURT: The objection is sustained.

MR. DUBIN: No further questions.

THE COURT: All right, anything further?

MR. OSBORNE: No, Your Honor. The United States rests.

THE COURT: You may step down, Ms. Nakasone.

(Ms. Nakasone was excused.)

THE COURT: All right, anything further?

MR. OSBORNE: No, your Honor; we rest.

THE COURT: Anything further, Mr. Dubin?

MR. DUBIN: Just to point out, Your Honor, that I'm surprised and unprepared because I relied upon the instructions I got from Leslie Sai, as to what your clerk said, and it's in my declaration. That's the only thing I can tell Your Honor.

I would move for a continuance until next Monday, so I can bring Mr. Clement here, at my expense, to put on the record – and, if Your honor is going to be here next week, I would ask, as a favor, Your Honor at least allow me that opportunity.

THE COURT: No, he needs no testimony; he gave a declaration.

All right, anything further?

MR. DUBIN: Well, Your Honor, I would just like to call to your attention – that is one of the three points that was raised in the new trial motion. The other point was, Mr. Clement testified that he was the friend who, in your finding of fact number 11, brought my stuff, and he testified as to the fact that he brought the stuff here, and he couldn't get my files to me until the second day of a day and a half trial. And that, in fact, finding of fact number 11 is in error. And that's something that the government has not contradicted, so you are faced with a situation where there's –

THE COURT: Well, I'm not faced with anything. That matter was taken up by the Court of Appeals, and you argued it to

the Court of Appeals. All of these matters were argued to the Court of Appeals.

MR. DUBIN: May I just remind Your Honor that nowhere in the opinion do they address that. And Mr. Clement –you had a very strong finding of fact number 11. As you know, the Court of Appeals is limited in the way they review these things. They gave due deference to your finding. I now have an eyewitness who testifies that he was the friend you referred to, and the finding is incorrect. I think I am entitled to an examination of that issue. I ask the court –

THE COURT: Anything further?

MR. DUBIN: -- to do that.

THE COURT: Anything further?

MR. OSBORNE: No, Your Honor.

THE COURT: All right, the motion for new trial is denied. There is no newly discovered evidence that has been set forth, either at this hearing, nor during any declarations in the motion made by the defendant.

MR. DUBIN: Thank you, Your Honor.

THE COURT: prepare the order, Mr. Osborne.

MR. OSBORNE: I will, Your Honor. Thank you.

(The hearing in the above-entitled case was concluded at 10:15 a.m.)

[Certified by Stephen B. Platt, Official Court Reporter, CSR No. 248, Thursday, April 3, 1997]

L. Declaration Of James W. Clement, Esq. – Filed January 21, 1997

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

United States of America,	)	No. CR-93-01434 MLR
	)	
Plaintiff,	)	DECLARATION OF JAMES
vs.	)	W. CLEMENT
	)	
Gary Victor Dubin,	)	
	)	
Defendant.	)	

DECLARATION OF JAMES W. CLEMENT

I, JAMES W. CLEMENT, DECLARE:

1. I have been a member of the Bar of the State of Hawaii since 1982, and in that year was also admitted to practice law in the United States District Court.

2. I currently reside in Ithaca, New York. I make the following statements of fact of my own personal firsthand knowledge, and if requested I am willing to attend an evidentiary hearing to testify in person concerning the matters described herein.

3. I first met Mr. Gary Victor Dubin when both of us worked at the law firm of Mukai, Ichiki, Raffetto & MacMillan in Honolulu, beginning in late 1982. In 1984 my wife (also a member of the Hawaii Bar) and I left for New York, and never had any contact with Mr. Dubin until the events described herein which took place in 1994.

4. In mid-1994, I was considering returning to practice law in Hawaii, and I telephoned attorneys whom I had known at the Mukai firm previously, including Mr. Dubin, and through those conversations learned of his tax case. In conjunction with my possible relocation back to Hawaii, I returned to Honolulu at the end of the summer in 1994, and

I sat as a visitor at Mr. Dubin's tax trial on both days, September 13 and 14, 1994, Judge Manuel Real presiding.

5. During both days of trial I sat in the audience in the visitors' section immediately behind Mr. Dubin who was located at the Defendant's table; he had no counsel and was sitting alone. I was there the entire time, except when Judge Real sent me to Mr. Dubin's residence to pick up his case and tax files.

6. At the start of trial, the morning of September 13, 1994, when Mr. Dubin appeared in the courtroom in handcuffs, taken from the Hospital by two U.S. Marshals, I watched two witnesses testify, briefly authenticating documents, and then, when Mr. Dubin complained that he did not have any of his case files with him, having been taken directly to the courtroom from the Hospital, the Assistant U.S. Attorney, Mr. Osborne, told the Judge that I was a friend of Mr. Dubin, that I was in the audience, that I knew where Mr. Dubin lived, and that I could get Mr. Dubin's case files for him.

7. The next thing I knew Judge Real called me to the podium and instructed me to get Mr. Dubin's files for him. Attached within Exhibit "A" to this Declaration are the relevant pages from the trial transcript of September 13, 1994, which I have asked Mr. Dubin to fax to me to review in preparing this Declaration; in those pages is an accurate record of what happened.[2] I left the courtroom at that time, about 1:30 p.m., went to Mr. Dubin's house, which was on the other side of the Island, forty minutes away, found two boxes of materials that appeared to be related to the tax case, and returned that day after the trial had adjourned, at approximately 5:00 p.m.

8. When I reached the courthouse, Mr. Dubin was gone, apparently taken to Halawa prison for the night. I inquired at the U.S. Marshal's office in the courthouse

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[2] Relevant excerpts from exhibits can be found in text of Petition.

whether I could bring the case materials to Mr. Dubin, and I was told that I could not since I was not his attorney. I was instructed by the Judge's clerk to leave the case materials with them and that they would give them to Mr. Dubin the next morning for the second day of trial. I observed the next morning that these boxes were sitting on the Defendant's table before he arrived that day to the courtroom. Only later during the trial did I discover from Mr. Dubin that I had brought to him only a duplicate set of the Government's Exhibits and none of his case or tax files.

9. In preparing this Declaration, I requested copies of various documents from Mr. Dubin having to do with my involvement at the trial; Mr. Dubin has faxed to me Judge Real's Findings of Fact, for instance, which I had never before seen. In Finding No. 11, Judge Real states that Mr. Dubin had his records "brought to him the morning of September 13, 1994 by a friend, also a lawyer, and those records were available to DUBIN throughout the trial". The pertinent parts of those Findings are included within Exhibit "C" hereto. I know of my own personal firsthand knowledge that Finding of Fact No. 11 is absolutely false.

10. Returning to the courtroom on September 14, 1994, I listened to and observed the oral testimony of three Government witnesses that final day of Mr. Dubin's trial: Mr. Chong (IRS Criminal Investigation Division Special Agent), Ms. Nakasone (Mr. Dubin's IRS Examiner), and Mr. Bain (IRS Revenue Agent). Mr. Dubin was obviously ill, but tried nevertheless due to the obvious importance of those two witnesses, to cross-examine Ms. Nakasone and Mr. Bain extensively. The order of witnesses on September 14, 1994, is shown in the trial transcript for that day; the relevant pages of the transcript are set forth within Exhibit "B" hereto.

11. During Mr. Dubin's cross-examination, I observed Assistant U.S. Attorney, Mr. Osborne, sitting at the prosecution's table, continually shaking his head up and down, coaching the Government witnesses how to answer Mr. Dubin's questions. Mr. Osborne's head shaking was

clearly visible to the witnesses, must have been noticed by Judge Real, and should have been seen by many in the audience as well. Mr. Dubin, however, facing the witnesses, was not in a position to see Mr. Osborne instructing the witnesses.

12. I observed the Government witnesses testify exactly as Mr. Osborne gestured to them, in what appeared to be a rehearsed procedure. I am not a trial lawyer; I thought the procedure was very unfair, but the entire trial was conducted by Judge Real in my opinion in a very unfair manner, which even overshadowed in my mind what the prosecutor was doing with his witnesses.

13. When the trial was completed, I immediately returned to New York, bewildered by what I had seen. I have never spoken with Mr. Dubin since the trial, until late October of this year when I had heard from attorneys in Honolulu that Mr. Dubin had returned from prison, and I telephoned him and first told him about the conduct of the Assistant U.S. Attorney, Mr. Osborne, at his trial, at which time he requested that I prepare this Declaration to inform the Court of my observations of the conduct of the prosecutor during his cross-examination of Government witnesses, and I have given the Court also my knowledge as to the falsity of Finding of Fact No. 11 as well as an officer of the Court and in the interest of justice.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 10th day of December, 1996, at Ithaca, New York.

/s/ James W. Clement

JAMES W. CLEMENT

M. Supplemental Declaration of James W. Clement, Esq. – Filed April 8, 1997

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

United States of America,	)	No. CR-93-01434 MLR
	)	
Plaintiff,	)	SUPPLEMENTAL
vs.	)	DECLARATION OF
	)	JAMES W. CLEMENT
Gary Victor Dubin,	)	
	)	
Defendant.	)	

SUPPLEMENTAL DECLARATION
OF JAMES W. CLEMENT

I, JAMES W. CLEMENT, DECLARE:

1. I have been a member of the Bar of the State of Hawaii since 1982, and in that year was also admitted to practice law in the United States District Court.

2. I currently reside in Ithaca, New York. I make the following statements of fact on my own personal firsthand knowledge.

3. I sat as a visitor at Mr. Dubin's tax trial on both days, September 13 an 14, 1994, Judge Manuel Real presiding. I have a vivid recollection of the testimony of Ms. Nakasone (Mr. Dubin's IRS Examiner), and Mr. Bain (IRS Revenue Agent), and of Assistant U.S. Attorney Osborne sitting at the prosecution's table, continually shaking his head up and down, or side to side, during questioning of these witnesses by his assistant and during their cross-examination by Mr. Dubin.

4. I also recall completely Mr. Dubin's disappointment on the second day of the trial when he opened the file boxes which I had brought back from his office (as ordered by Judge Real) and discovered that I had brought him only his copies of the Government's papers and none of his own defense papers or records.

5. I submitted a Declaration to this Court regarding these matters, and made airline reservations to fly to Hawaii to be examined regarding same at the hearing scheduled for March 24th, 1997. We were told through Judge Real's clerk that he could not decide until the hearing whether an evidentiary hearing would be allowed. Thus, because the airline tickets cost approximately $2,400, I packed and prepared to be there within 24 hours, should Judge Real allow me to testify. At this time, I remain prepared to attend any evidentiary hearing to testify in person concerning the matters described herein, should the Court so desire.

I declare under penalty of perjury under the law of the United States of America that the foregoing is true and correct. Executed this 1st day of April, 1997, as Ithaca, New York.

/s/ James W. Clement

JAMES W CLEMENT

N. Declaration Of Gary Victor Dubin – Filed March 21, 1997

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

United States of America,	)	No. CR-93-01434 MLR
	)	
Plaintiff,	)	DECLARATION OF GARY
vs.	)	VICTOR DUBIN
	)	OBJECTING TO HEARING
Gary Victor Dubin,	)	OF MOTION FOR NEW
	)	TRIAL BY THE
Defendant.	)	HONORABLE MANUEL
	)	L. REAL AND REQUEST
	)	FOR CONTINUANCE FOR
	)	EVIDENTIARY HEARING

DECLARATION OF GARY VICTOR DUBIN OBJECTING TO HEARING OF MOTION FOR NEW TRIAL BY THE HONORABLE MANUEL L. REAL AND REQUEST FOR CONTINUANCE FOR EVIDENTIARY HEARING

I, GARY VICTOR DUBIN, DECLARE:

1. I am admitted to practice law in this United States District Court, and I am the Defendant in this action. I make the within statements of my own personal firsthand knowledge.

2. On January 21, 1997, I filed my New Trial Motion in this case, accompanied by (1) the Declaration of James William Clement attesting to certain newly discovered prosecutorial misconduct at my trial, requesting that I be allowed an evidentiary hearing so that Mr. Clement could come to Honolulu from New York State to testify, and (2) my Declaration disqualifying the Honorable Manuel L. Real from presiding at the consideration of my motion for cause.

3. On January 26, 1997, I renewed my request, by letter to Magistrate Judge Barry Kurren, to bring Mr. Clement to Honolulu at my expense to attend an evidentiary hearing and my belief that the Honorable Manuel L. Real should not preside at the hearing of that motion, and in furtherance thereof I submitted to Magistrate Judge Kurren the original and five copies of three motions: (1) Motion To Disqualify The Honorable Manuel L. Real, (2) Ex Parte Application For Expedited Oral Hearing Of Motion To Disqualify The Honorable Manuel L. Real, and (3) Ex Parte Application For Expedited Oral Hearing of Motion For New Trial; a true copy of said letter and the three attached motions are set forth as Exhibit "E" hereto.[3]

4. On March 7, 1997, I received notice that the Court had set a hearing of my new trial motion before the

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[3] Exhibits have not been included in Appendix as duplicative.

Honorable Manuel L. Real for March 24, 1997, at 10:00 a.m., but I never received even lodged copies of any of the three above-referenced motions, to this day.

5. On March 10, 1997, I wrote to Leslie Sai, courtroom deputy in Honolulu to Judge Real, requesting information as to the status of the disqualification motion and requesting instructions as to whether to bring Mr. Clement to Honolulu for the March 24, 1997, hearing, since such travel is costly, not knowing if he would be allowed to testify on March 24, 1997, and Ms. Sai informed me subsequently that according to Judge Real he could not make a determination as to whether there would be an evidentiary hearing until the hearing itself, so I was to do whatever I like, while saying nothing about the disqualification motion; a true copy of said letter is set forth in Exhibit "F".

6. Meanwhile, Assistant U.S. Attorney Leslie Osborne has submitted two papers to the Court for the March 24, 1997, hearing, not denying that he used head-signals to control the testimony of key Government witnesses as Mr. Clement testified to in his already-filed Declaration, and since Mr. Osborne has chosen either not to deny such misconduct or has by his silence waived any last-minute denial attempt at the hearing (which would be highly unfair and prejudicial to me) it would appear that Mr. Clement's in-court testimony is unneeded, and perhaps this is what Judge Real meant to communicate.

7. However, in the event that the Court requires an evidentiary hearing or Mr. Osborne intends to surprise Defendant by making such a denial for the first time at the March 24, 1997, hearing, Defendant wishes to inform the Court that Mr. Clement is standing by to come to Honolulu and would be available in Honolulu to testify if requested to do so in one week, more of less, of the March 24, 1997, hearing date – the expenses for such travel ultimately being properly taxed to Mr. Osborne personally.

8. Defendant will therefore, under such conditions, if necessary orally move the Court at the March 24, 1997,

hearing for a brief continuance to permit Mr. Clement reasonable notice to fly to Honolulu to so testify.

9. And, for the reasons stated in Defendant's filed Declaration Disqualifying The Honorable Manuel L. Real, and in the disqualification motion referenced above previously submitted to the Court through Magistrate Judge Barry Kurren, I will remind the Court at the commencement of the March 24, 1997, hearing that the Honorable Manuel L. Real is thus disqualified from presiding at the hearing of my new trial motion as a matter of law and request assignment to another judge.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed at Honolulu, Hawaii, on March 20, 1997.

/s/Gary Victor Dubin

GARY VICTOR DUBIN